Briefing

Real Estate

BURGES SALMON

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Contaminated Land – True or False

Contaminated land remains a major concern for many in the real estate sector. The clean-up regime we have under Part IIA of the Environmental Protection Act 1990 (the "**EPA**") ("**Part IIA**") has only been used to clean up a relatively small number of sites but the impact in terms of cost and time for the parties associated with those sites has been huge. Clean up of historically contaminated land can of course be dealt with in other ways, for example, through planning conditions and environmental permits, but this briefing concentrates on Part IIA and the answers to these "True or False" questions highlight some common misconceptions.

1. A risk-based approach, rather than the mere presence of contaminants, is used to assess whether land is classed as contaminated.

True

Part IIA takes a risk-based approach to determining whether land is contaminated for the purposes of the regime. Just because a polluting substance is in the ground at a certain level does not mean the site will be deemed "contaminated". The relevant local authority will assess the likelihood that significant harm will occur as a result of substances in, on or under the land, and the scale and seriousness of the harm. Local authorities must carry out risk assessments to decide whether land qualifies as contaminated land under the regime.

2. If the land is not deemed 'contaminated' at the outset, there will be no problem as long as the substances in the ground do not change.

False

As a result of the risk-based approach to contaminated land it is possible that if a more sensitive use is brought to a site or someone increases the likelihood of substances escaping, the land can become "contaminated" pursuant to the regime, even if the substances in the ground have not changed.

3. As long as I have not breached any laws or permits, I cannot be liable for any clean-up.

False

Whether you are liable for clean-up under Part IIA is nothing to do with whether or not you have breached law. That is why compliance with law warranties in sale contracts do little to help buyers when it comes to contaminated land. Responsibility rests with those who have "caused or knowingly permitted" the presence of the substances (Class A appropriate persons) or if no Class A appropriate person can be found, the current owner or occupier of the land (Class B appropriate persons).

4. Ultimately, as long as the original polluter(s) are still in existence they will be held liable for the contamination.

False

As mentioned above, responsibility rests at first instance with anyone who has "caused or knowingly permitted" the presence of the substances. "Knowingly permit" covers anyone who knows about the substances, has the power to do something to deal with them/remove them and chooses not to. Therefore a buyer of land who later finds out about substances and does not clean them up or deal with them is "as liable" as the person who polluted in the first place. This is a crucial point for buyers to appreciate. There could, of course, in any situation be quite a number of "causers or knowing permitters" for a site.

5. Where there are a number of people potentially liable to pay for clean-up, guidance tests are applied to decide who pays and a party can be excluded from liability if certain tests are passed.

True

A variety of statutory exclusion and apportionment tests apply if there is more than one appropriate person. The regulators have to apply these and if a potentially appropriate person meets the requirements for an exclusion test it will not be liable under the regime.

Application of the tests is a complex area and needs to be fully understood and applied correctly in order to be relied upon.

continued overleaf

6. As long as you use standard contract clauses based on the guidance tests, you will transfer liability to others.

False

This is another major mistake that many people make. The guidance tests only apply if there is more than one potentially appropriate person and then only between certain sets of appropriate persons. By way of example, a common test used by inexperienced conveyancers is to imagine that they are freeing their client from all liability if they say that the property is purchased at a value that reflects that the site is contaminated. For this test to be satisfied, both the seller and buyer in the future will need to have been identified as appropriate persons. If the buyer no longer exists, the fact that the seller sold at a discount is irrelevant.

7. You will always be free of any risk of liability if you agree in writing with the seller who will be liable for clean-up in the event of a contaminated land designation.

False

The appropriate persons may have agreed in writing to divide responsibility for the contamination between them but, as above in 6, if the other party is no longer around this is academic. Even if both parties are around, if either of the parties raises an objection to the validity of the agreement, an enforcing authority may disregard it.

8. Liability for contaminated land is governed entirely by the contaminated land regime under Part IIA of the EPA.

False

Part IIA of the EPA is the statutory regime governing contaminated land. However, as mentioned above, planning conditions are commonly used to procure clean-up of contaminated land. Where a party applies for planning permission to redevelop contaminated land, the local planning authority may impose conditions in the planning permission requiring remediation. In contrast to the contaminated land regime, the planning regime is not concerned with who caused the contamination; responsibility for remediation rests with the party implementing the planning permission.

Equally, if a person operating from the site holds an environmental permit it is more likely that the regulator will look to use the permit conditions to force clean up rather than delve into the Part IIA regime.

9. As long as I don't go looking for the contamination, I should be OK.

False

Local authorities must identify contaminated land and then require the appropriate person to clean it up. The authority may investigate your land and declare that it is contaminated pursuant to the regime, even if you have chosen not to carry out site investigations to ascertain if any contaminants are present at the land. Equally, someone may tell you later about contaminants and, as above, if you do nothing you run the risk of becoming a "knowing permitter".

10. If my neighbour pollutes my land, they will be the liable party.

False

Or at least not necessarily true. If those who have caused or knowingly permitted the contamination cannot be found, local authorities may task the land's current owner or occupier with the potentially costly obligation of remediating the contamination. Furthermore, as an owner or occupier of the land you could eventually become a "knowing permitter" with the passage of time if:

i. You know the polluting substances are in your land;

ii. You have the means and a reasonable opportunity to deal with the contamination; and

iii. You do not deal with the contamination.

Of course, you could always look to bring common law actions against the polluter to recover any losses.

Part IIA is complicated and much misunderstood. Burges Salmon has dealt with many actions and claims over the years, including both England's and Scotland's first such Part IIA contaminated land sites. The team knows and understands all the intricacies of Part IIA and we have guided many clients through the application of the regime. If you need more assistance or would like to discuss further contact ***Ross Fairley on 0117 902 6351 or ross.fairley@burges-salmon.com or Sam Sandilands on 0117 307 6963 or sam.sandilands@burges-salmon.com.***

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